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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH N. HANCOCK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A01-0612-CR-549
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable Richard D. McIntyre, Sr., Judge
Cause No. 47C01-9908-CF-398

May 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Joseph N. Hancock ("Hancock") appeals his sentence for rape[1] and criminal deviate conduct.[2] We affirm.

Issues

Hancock raises a single issue on appeal: whether his sentence is inappropriate in light of the nature of the offense and his character. The State raises an additional issue: whether Hancock is precluded by res judicata from challenging certain aspects of his sentence.

Facts and Procedural History

This constitutes the fourth time an Indiana appellate court has considered this case, described by the earliest of the opinions as follows:

> . . . [O]n August 10, 1999, Hancock met the victim, T.J., as she was riding her bicycle to work. Hancock stopped T.J. and asked her if she wanted to go out to eat with him and his girlfriend, Jessica Gotwals ("Gotwals"), later that evening. T.J. agreed and met Hancock and Gotwals at approximately 7:30 p.m. at the house of Hancock's friend. T.J., Hancock, Gotwals, and Gotwals' two small children went out for pizza and then proceeded to Hancock's house in Mitchell, Indiana, arriving at approximately 9:00 p.m. Once arriving at Hancock's house, Gotwals put her children to bed, and T.J. and Gotwals began talking. While T.J. and Gotwals were talking, Hancock gave T.J. a potato chip with some ham salad on it, which, according to T.J. "tasted bitter" and made her feel "sick to her stomach." R. at 562. According to Gotwals, Hancock told her that he put eight blue Xanax ("Alprazolam") tablets in the ham salad he gave to T.J. R. at 635. T.J. soon began nodding her head and acting very tired. Hancock lifted T.J.'s shirt and starting touching her breasts. The testimony revealed that Hancock then proceeded to engage in oral sex with T.J. Hancock next engaged in sexual intercourse with T.J., and then induced T.J. to perform oral sex on him. T.J. did not consent to any of this sexual activity.

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[1] Ind. Code § 35-42-4-1.
[2] Ind. Code § 35-42-4-2.

> While Hancock was engaging in sexual intercourse with T.J., Gotwals left Hancock's house to make arrangements for transportation to leave. Upon returning, Gotwals asked T.J. if she wanted to go home, and after T.J. responded affirmatively, Gotwals helped T.J. out to the car. Concerned that T.J. had "O.D.'d or something," Gotwals drove T.J. to the hospital. R. at 645. After both T.J. and Gotwals informed hospital staff and police about the incident with Hancock, police arrested Hancock and charged him with three counts of Rape, and five counts of Criminal Deviate Conduct, all Class A felonies.

Hancock v. State, 758 N.E.2d 995, 999 (Ind. Ct. App. 2001) (footnote omitted) (emphasis added), rev'd in part, 768 N.E.2d 880 (Ind. 2002). Under Indiana Code Section 35-42-4-1, rape is generally a Class B felony, but it is a Class A felony if commission of the offense was facilitated by giving the victim a drug without her knowledge. The statute for criminal deviate conduct functions identically. Ind. Code § 35-42-4-2.

The jury found Hancock guilty of two counts of rape and two counts of criminal deviate conduct. The trial court entered judgments of conviction on one count of rape and one count of criminal deviate conduct,[3] and sentenced Hancock to fifty years each, to be served consecutively, for a total aggregate sentence of one hundred years.[4]

On appeal, this Court affirmed Hancock's sentence.[5] Hancock, 758 N.E.2d at 1007. On transfer, however, our Supreme Court held that two felonies may not be elevated in class based upon the same statutory factor and factual basis. Hancock v. State, 768 N.E.2d 880, 880 (Ind. 2002). Accordingly, the Supreme Court ordered Hancock to be re-sentenced for

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[3] Initially, the trial court entered judgments of conviction on all four verdicts. In light of double jeopardy concerns, the trial court vacated its judgments of conviction on one count of rape and one count of criminal deviate conduct.

[4] On April 25, 2005, the General Assembly amended the sentencing statute to include advisory, rather than presumptive, sentences.

[5] This Court held that the convictions for rape and criminal deviate conduct did not violate the Indiana Double Jeopardy Clause. Hancock v. State, 758 N.E.2d 995, 1006 (Ind. Ct. App. 2001).

criminal deviate conduct as a Class B felony. In all other respects, the Court summarily affirmed the sentence. Id.

While rehearing before our Supreme Court was pending, the trial court re-sentenced Hancock. On appeal from that decision, this Court concluded that the re-sentencing was a nullity as the Supreme Court opinion had not yet been certified. Hancock v. State, 786 N.E.2d 1142 (Ind. Ct. App. 2003). Therefore, this Court ordered the trial court to "re-do what it has already done." Id. at 1144.

A different trial court judge scheduled a sentencing hearing for July 3, 2003, by which time Judge Richard D. McIntyre, Sr., the original sentencing judge, was on active duty in the military. Hancock moved successfully for a continuance, seeking Judge McIntyre to preside. Hancock filed similar motions in 2004, 2005, and March of 2006. On August 17, 2006, Judge McIntyre reduced the conviction for criminal deviate conduct to a Class B felony in light of the Supreme Court opinion. Further, the trial court found no mitigating circumstances, found aggravating circumstances in Hancock's criminal history dating to 1967 and in the fact that Hancock violated bond in two pending cases at the time of the instant offense, at least one of which was a Class B felony. The trial court sentenced Hancock to fifty years on the rape conviction and twenty years on the criminal deviate conduct conviction, the maximum for a Class B felony. As with the original sentence, those convictions were to be served consecutively, for a new aggregate sentence of seventy years. Hancock now appeals.

Discussion and Decision

I. Res Judicata

Hancock argues that his seventy-year sentence is inappropriate. The State responds that certain elements of his sentence are barred from re-litigation as res judicata. "The doctrine of res judicata bars a later suit when an earlier suit resulted in a final judgment on the merits, was based on proper jurisdiction, and involved the same cause of action and the same parties as the later suit." Reed v. State, 856 N.E.2d 1189, 1194 (Ind. 2006). It bars repetitious litigation of the same dispute. Id.

In 2002, our Supreme Court addressed Hancock's sentence, summarily affirming it in all respects other than the elevation of criminal deviate conduct to a Class A felony. The Supreme Court's consideration included the trial court's decision to impose the maximum sentence of fifty years for the rape conviction, as well as the trial court's decision that Hancock serve consecutively the two sentences. Accordingly, we will not revisit these issues.

As to Hancock's sentence for criminal deviate conduct, we note that the trial court revised its findings of aggravating circumstances. In 2000 and 2006, the trial court found both Hancock's criminal history and his having committed the instant offense while on bond as aggravating circumstances.[6] At the initial sentencing hearing, however, the trial court found the victim's being "mentally infirm" to be "the primary aggravating circumstance."[7]

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[6] Hancock admitted in argument before the trial court that both findings satisfied Blakely v. Washington, 542 U.S. 296 (2004) and Apprendi v. New Jersey, 530 U.S. 466 (2000). App. at 42. See also infra note 11.

App. at 18. On remand almost six years later and subsequent to a series of decisions by the United States Supreme Court and our Supreme Court regarding sentencing, the trial court did not consider the victim's being "mentally infirm" because that had not been found by the jury beyond a reasonable doubt.[8] App. at 18. In light of the revised sentencing statement,[9] we conclude that Hancock's argument as to his sentence for criminal deviate conduct is not barred as res judicata.

II. Appropriate Sentence

Hancock argues that his sentence of twenty years for criminal deviate conduct as a Class B felony is inappropriate. We "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we] find[] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B).

Hancock lured T.J. to his home, tricked her into consuming eight Xanax tablets without her knowledge, and then engaged in criminal deviate conduct with her. T.J. acted very tired and needed assistance walking to the car. Gotwals was sufficiently concerned about T.J.'s reaction to the drugs that she drove her to the hospital. Hancock makes much of

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[7] The State had not sought to prove that T.J. was "mentally infirm." To the contrary, the State argued as follows:

> The State's position is that this victim was mentally disabled on August 10, 1999, and she was so disabled by the defendant providing her with Alprazolam, and that is what caused her mental disability, and I have not and I will not argue today that she would have been disabled on other days. That's been our position, that's the way it's been charged, and I think it's proper.

Hancock, 758 N.E.2d at 1003 (citing page 1121 of the record in that case).

[8] See Blakely; Apprendi; Trusley v. State, 829 N.E.2d 923 (Ind. 2005); and Smylie v. State, 823 N.E.2d 679 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005).

the fact that T.J. suffered no physical injuries in the incident. In his actions, however, he showed great disregard for her physical condition, administering a large dose of a prescription drug.[10]

As to Hancock's character, he has had a history of encounters with the criminal justice system, dating back to his arrest as a juvenile in 1967. As an adult, Hancock was previously arrested at least seventeen times in approximately twenty-eight years. Hancock pled guilty to at least seven misdemeanors. Those included theft, criminal mischief, operating on a suspended license in Kentucky, and four misdemeanors related to alcohol. Meanwhile, Hancock committed the instant offense while on bond for other charges.[11]

Hancock directs us to two cases in which the Indiana Supreme Court recently concluded that the maximum sentence was inappropriate: Ruiz v. State, 818 N.E.2d 927 (Ind. 2004); and Neale v. State, 826 N.E.2d 635 (Ind. 2005). Both are distinguishable. In the first, twenty-year-old Ruiz was convicted of child molestation for having sexual intercourse approximately six times with a thirteen-year-old girl. She described their relationship as boyfriend-girlfriend. The trial court found two mitigating circumstances, his pleading guilty and his showing remorse, and one aggravating circumstance, Ruiz's four prior alcohol-

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[9] On remand, the trial court declined to enter another finding that it had made in the initial sentencing hearing; "that the defendant is in need of correctional treatment best provided by commitment to a penal facility." App. at 17.

[10] The symptoms of overdose of Xanax are confusion, convulsions, drowsiness or coma, shakiness, slow heartbeat, slow reflexes, slurred speech, staggering, troubled breathing, and weakness. http://www.mayoclinic.com/health/drug-information/DR602101 (last viewed May 4, 2007).

[11] Contrary to Hancock's assertion, it is irrelevant that the charge for which he was on bond was ultimately dismissed. A violation of bond is a consideration distinct from criminal history, relevant in itself as evidence of a defendant's willingness to disobey a court order. See Field v. State, 843 N.E.2d 1008, 1011 (Ind. Ct. App. 2006) (citing Ryle v. State, 842 N.E.2d 320, 323 (Ind. 2005) (holding that committing offense while on

related misdemeanors, and sentenced Ruiz to the maximum twenty years imprisonment for a Class B felony. On appeal, our Supreme Court noted Wooley v. State, in which it held that one prior conviction for driving while intoxicated was not a significant aggravating factor in sentencing for murder. 716 N.E.2d 919, 929 (Ind. 1999). The Ruiz Court concluded that the maximum sentence of twenty years was inappropriate and ordered that Ruiz be re-sentenced to the presumptive term of ten years. Ruiz, 818 N.E.2d at 929.

Five months later, the Indiana Supreme Court addressed a different conviction for child molesting. In Neale, the defendant had sexual intercourse three or four times with a twelve-year-old girl. The trial court found three aggravating circumstances, Neale's extensive criminal history, the fact that he committed the offense multiple times while residing with the victim, and Neale's exploiting his position of trust as stepfather to the victim, and four mitigating circumstances, that the crime was the result of circumstances unlikely to recur, the defendant was likely to respond to probation and counseling, the defendant stated that he was willing to make restitution to the victim, and the defendant's imprisonment would cause undue hardship to his wife and their daughter. Neale's criminal history was extensive, but limited to misdemeanors, most of which were alcohol-related. The trial court sentenced Neale to the maximum term of fifty years imprisonment for a Class A felony, with ten years suspended. Our Supreme Court held the maximum sentence to be inappropriate, and ordered Neale to be re-sentenced to a term of forty years with ten years suspended. Neale, 826 N.E.2d at 639.

In both Ruiz and Neale, our Supreme Court found the maximum sentence to be

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probation is relevant to sentencing and that information in presentence investigation report is sufficiently

inappropriate where the defendant's criminal history consisted exclusively of misdemeanors, most or all of which were alcohol-related. The Court revised the terms of imprisonment to the presumptive term and the median between the presumptive term and the maximum, respectively.

Unlike in Ruiz and Neale, the trial court found no mitigating circumstances in sentencing Hancock. Further, in Wooley, Ruiz, and Neale, our Supreme Court concluded that alcohol-related misdemeanors should not be considered as significant aggravating circumstances for murder and child molestation. Here, however, Hancock used a controlled substance as the primary means of disabling his victim and committing the offense. Within this context, we conclude that Hancock's alcohol-related record is more relevant than in the above three cases.

Hancock has an extensive history of misdemeanors and arrests. While arrests for charges that are later dismissed do not constitute a criminal history, such arrests are "relevant to the court's assessment of the defendant's character," precisely the nature of our inquiry under Indiana Appellate Rule 7(B). Tunstill v. State, 568 N.E.2d 539, 545 (Ind. 1991).

> [A] record of arrest, particularly a lengthy one, may reveal that a defendant has not been deterred even after having been subject to the police authority of the State. Such information may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime.

Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005) (citing Scheckel v. State, 620 N.E.2d 681, 683 (Ind. 1993) (emphasis added)). Meanwhile, Hancock was arrested for the instant offense while on bond for separate charges. We take this as additional evidence of Hancock's

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conclusive to satisfy Apprendi), cert. denied, 127 S. Ct. 90 (2006)), trans. denied.

character. Finally, we note that Gotwals's children were in the residence at the time that Hancock committed this offense. See Jones v. State, 807 N.E.2d 58, 69 (Ind. Ct. App. 2004) (upholding consecutive sentencing under Ind. Appellate Rule 7(B) where, inter alia, defendant sold crack out of his residence while many children were present), trans. denied. In considering the nature of the offense and Hancock's character, we conclude that his sentence for criminal deviate conduct was not inappropriate.

Conclusion

We conclude that certain aspects of Hancock's sentence are res judicata. With respect to his sentence for criminal deviate conduct, we conclude that the maximum term of imprisonment was not inappropriate.

Affirmed.

SHARPNACK, J., and MAY, J., concur.